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Azaman bin Aziz v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05(M)-346–12 OF 2015
TENGKU MAIMUN, AHMADI ASNAWI AND ZAMANI A RAHIM JJCA
4 APRIL 2017

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Criminal Procedure — Trial — Prima facie case — Drug trafficking trial — Whether defence's failure to submit no-case-to-answer at end of prosecution's case impliedly meant it conceded that prosecution made out prima facie case — Whether absent any challenge to weight of the drugs in question or the manner in which the weight was determined concession that prima facie case had been established necessarily meant weight of drugs had been proven — Whether trial judge made correct findings of fact on various aspects of case such that there was no appealable error that required appellate intervention

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The High Court found the appellant guilty on a charge of trafficking in 1,793g of cannabis and sentenced him to suffer the mandatory death penalty under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). The appellant was caught red-handed with the cannabis by a police party lying in ambush when he arrived at a pre-determined venue to 'sell' the drugs to an undercover police officer, PW5, who had some days earlier been introduced to the appellant as a 'buyer' for the drugs by a police informer. In his defence to the charge, the appellant alleged that the police informer was named Muzammil and that he was also a drug trafficker; that the cannabis in question was actually procured by Muzammil and that on the day he was arrested with the drugs, the appellant was merely delivering the cannabis on Muzammil's behalf to PW5. In ruling that the appellant's defence failed to cast a reasonable doubt on the prosecution's case, the trial judge found, inter alia, that Muzammil's name was raised for the first time only during the defence stage of the trial and that the contention that the appellant was merely delivering the drugs to PW5 on Muzammil's behalf was an afterthought that could not be given any weight. In the instant appeal, the appellant alleged that the trial judge erred in: (a) finding that the prosecution had proven the weight of the cannabis when it was not established that the weighing machines used by the chemist to verify the weight of the drugs had been properly calibrated; (b) failing to properly evaluate the evidence of the material witnesses in the case; (c) holding that the informer's secrecy in the present case was protected under s 40(1) of the DDA and failing to invoke adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 for not calling the informer to testify; and (d) failing to find that PW5 was not a credible witness.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) The defence did not make any submission of no-case-to-answer at the end of the prosecution's case. It was therefore implicit that the defence had conceded that a prima facie case was established against the appellant upon the charge proferred against him. That prima facie finding necessarily included the weight of the impugned drugs and, as a matter of common sense, this had to involve the finding that the weighing machines used by the chemist were accurate and had been calibrated on schedule. The appellant never adduced new evidence to warrant a re-visit of the prima facie finding on the weight of the cannabis. No challenge was made as to the calibration or accuracy of the weighing machines and neither was the chemist challenged at all on her evidence. Her evidence, therefore, had to be accepted as true. There was no basis for the appellant to complain at this late stage that the weighing machines were not calibrated and were inaccurate and that the weight of the cannabis had therefore not been proven (see paras 43–45).

(2) The trial judge was correct to find that the defence's story — that it was Muzammil who came to the appellant's house with the drugs and requested the appellant to deliver them to PW5 — was an afterthought, thus detracting from the weight to be accorded to the defence. The trial judge correctly found that Muzammil's name and the role played by Muzammil was never raised to the prosecution's witnesses but was raised for the first time only during the defence stage of the trial. If, as contended by the appellant, the informer was Muzammil and that he was also a drug trafficker, there was nothing that prevented the appellant from naming Muzammil as the informer at the earliest possible opportunity or from identifying and naming Muzammil as the informer during the cross-examination of the prosecution's police witnesses (see paras 48 & 54–55).

(3) The evidence did not suggest that the informer in the present case had metamorphosed into an agent provocateur such that he could not hide behind the cloak of secrecy under s 40(1) of the DDA for protection. The trial judge was correct in so finding and also in finding that there was no basis to invoke s 114(g) of the Evidence Act 1950 against the prosecution for failing to call the informer to testify (see para 63).

(4) The trial judge had found that PW5 was a credible witness despite the testimonies of DW3 and DW4 that PW5 had lied elsewhere in an unrelated case. It was open to the trial judge and it was within his sole province, for good reasons, to have found PW5 to be a credible witness. The Court of Appeal was in a most disadvantageous position to disagree with the trial judge. The evidence showed that the three telephone calls made by PW5 relating to the confirmation of the drugs purchase and the arrangement as to where the drugs were to be transacted were fully

recorded in exh P24B. It lent credence to PW5's testimony that there was an agreement between him and the appellant to transact in the drugs. The subsequent seizure of the drugs fortified PW5's testimony. This court was on all fours with the factual findings of the trial judge. There was nothing in PW5's testimony that was not inherently improbable. Neither were there material contradictions. As such, there was no reason not to accept his testimony (see paras 70, 72 & 74).

[Bahasa Malaysia summary

Mahkamah Tinggi mendapati perayu bersalah atas tuduhan mengedar dadah kanabis seberat 1,793g dan menjatuhkan hukuman mati di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Perayu ditangkap dengan kanabis oleh pihak polis yang mengendap apabila dia tiba di tempat yang ditentukan terlebih dahulu untuk 'menjual' dadah kepada pegawai polis yang menyamar, PW5, beberapa hari terdahulu diperkenalkan kepada perayu sebagai 'buyer' untuk dadah tersebut oleh pemberi maklumat polis. Dalam pembelaan kepada pertuduhan, perayu mendakwa bahawa pemberi maklumat polis yang bernama Muzammil dan dia juga adalah pengedar dadah; bahawa kanabis yang dipersoalkan sebenarnya diperolehi oleh Muzammil dan bahawa pada hari dia ditangkap dengan dadah tersebut, perayu hanya menghantar kanabis bagi pihak Muzammil kepada PW5. Dalam memutuskan bahawa pembelaan perayu gagal untuk melemparkan keraguan munasabah ke atas kes pihak pendakwaan, hakim perbicaraan mendapati, antara lain, bahawa nama Muzammil dibangkitkan untuk pertama kali semasa peringkat pembelaan perbicaraan tersebut dan hujahan bahawa perayu hanya menghantar dadah tersebut kepada PW5 bagi pihak Muzammil adalah sesuatu yang difikirkan kemudian yang tidak boleh diberikan apa-apa pertimbangan. Dalam rayuan ini, perayu mendakwa bahawa hakim perbicaraan tersilap dalam: (a) mendapati bahawa pihak pendakwaan telah membuktikan berat kanabis apabila ia tidak dibuktikan bahawa mesin timbang yang digunakan oleh ahli kimia untuk mengesahkan dadah tersebut telah ditentukur dengan betul; (b) gagal untuk secara betul menilai keterangan saksi-saksi material dalam kes; (c) memutuskan bahawa kerahsiaan pemberi maklumat dalam kes ini tidak dilindungi di bawah s 40(1) ADB dan gagal untuk membangkitkan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950 kerana tidak memanggil pemberi maklumat untuk memberi keterangan; dan (d) gagal untuk mendapati bahawa PW5 bukan saksi yang boleh dipercayai.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Pembelaan tidak membuat apa-apa hujahan tiada kes untuk dijawab di akhir kes pihak pendakwaan. Oleh itu adalah tersirat bahawa pembelaan telah bersetuju bahawa kes prima facie telah dibuktikan terhadap perayu ke atas tuduhan yang dibuat terhadapnya. Dapatan prima facie secara

perlu memasukkan berat dadah yang dipersoalkan tersebut dan, sebagai mengikut akal, ini perlu melibatkan dapatan bahawa mesin timbang yang digunakan oleh ahli kimia adalah tepat dan telah ditentukur mengikut jadual. Perayu tidak pernah mengemukakan keterangan baru untuk mewajarkan penyelidikan semula terhadap dapatan prima facie ke atas berat kanabis. Tiada cabaran dibuat terhadap penentukuran atau ketepatan mesin timbang dan juga ahli kimia tidak dicabar langsung atas keterangannya. Keterangannya, oleh itu, perlu diterima sebagai benar. Tidak terdapat asas untuk perayu mengadu pada peringkat lewat ini bahawa mesin timbang tidak ditentukur dan tidak tepat dan bahawa berat kanabis oleh itu tidak dibuktikan (lihat perenggan 43–45).

(2) Hakim perbicaraan adalah betul untuk mendapati bahawa cerita pembelaan — bahawa ia adalah Muzammil yang datang ke rumah perayu dengan dadah dan meminta perayu menghantarnya kepada PW5 — adalah sesuatu yang difikirkan kemudian, oleh itu mengurangkan berat untuk diberikan kepada pembelaan. Hakim perbicaraan secara betul mendapati bahawa nama Muzammil dan peranan yang dimainkan oleh Muzammil tidak pernah dikemukakan kepada saksi-saksi pihak pendakwaan tetapi dibangkitkan untuk pertama kali hanya semasa diperingkat pembelaan perbicaraan. Jika, seperti yang dihujahkan oleh perayu, pemberi maklumat adalah Muzammil dan dia juga adalah pengedar dadah, tiada apa yang menahalang perayu daripada menamakan Muzammil sebagai pemberi maklumat pada peluang pertama kali atau daripada mengenalpasti dan menamakan Muzammil sebagai pemberi maklumat semasa pemeriksaan balas saksi-saski polis pihak pendakwaan (lihat perenggan 48 & 54–55).

(3) Keterangan tidak mencadangkan bahawa pemberi maklumat dalam kes ini telah bertukar kepada ejen perangkap dengan itu dia tidak boleh bersembunyi di belakang penyembunyian rahsia di bawah s 40(1) ADB untuk perlindungan. Hakim perbicaraan adalah betul dalam mendapati sedemikian dan juga dalam mendapati bahawa tidak terdapat asas untuk membangkitkan s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan kerana gagal untuk memanggil pemberi maklumat untuk memberi keterangan (lihat perenggan 63).

(4) Hakim perbicaraan telah mendapati bahawa PW5 adalah saksi yang boleh dipercayai meskipun keterangan DW3 dan DW4 bahawa PW5 telah berbohong di tempat lain di dalam kes yang tidak berkaitan. Ia terbuka kepada hakim perbicaraan dan adalah dalam tanggungjawab satu-satunya, untuk alasan baik, mendapati PW5 adalah saksi yang boleh dipercayai. Mahkamah Rayuan berada dalam keadaan yang tidak terbaik untuk tidak bersetuju dengan hakim perbicaraan. Keterangan menunjukkan bahawa tiga panggilan telefon dibuat oleh PW5 berkaitan kepada pengesahan dadah yang dibeli dan penyusunan di mana dadah

tersebut perlu diuruskan direkodkan secara penuh di dalam eksh P24B. Ia memberi kepercayaan kepada keterangan PW5 bahawa terdapat perjanjian di antara dia dan perayu untuk berurusan dengan dadah tersebut. Perampasan kemudian terhadap dadah tersebut memperkuatkan keterangan PW5. Mahkamah ini memihak dapatan fakta hakim perbicaraan. Tidak terdapat apa-apa di dalam keterangan PW5 bahawa tidak semestinya tidak mungkin. Juga tidak terdapat material bertentangan. Dengan itu, tidak ada alasan untuk tidak menerima keterangannya (lihat perenggan 70, 72 & 74).]

Notes

For cases on prima facie case, see 5(3)*Mallal's Digest* (5th Ed, 2017 Reissue) paras 6115–6133.

Cases referred to

Chua Beow Huat v PP [1970] 2 MLJ 29; [1968] 1 LNS 24 (refd)
Dato' Seri Anwar Ibrahim v PP [2014] MLJU 1876; [2014] 5 CLJ 679, CA (refd)
Kamalahassan a/l Latchimanan v Pendakwa Raya [2008] 3 MLJ 810; [2008] 4 AMR 481, CA (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647; [2009] 1 CLJ 15, CA (refd)
Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)
Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ Rep 221, SC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
Prabakaran a/l Peraisamy v PP [2013] 1 MLJ 304; [2012] 8 CLJ 133, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 CLJ 215, HC (refd)
Shahrizal bin Abdul Ghani v PP [2014] 1 MLJ 769; [2014] 1 CLJ 70, CA (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 ss 2, 40(1), 40A
Evidence Act 1950 ss 114(g), 146(c)

Appeal from: Criminal Trial No 45A-18–12 of 2011 (High Court, Taiping)

Charan Singh a/l Kartar Singh (Jagdave Singh a/l Kuldeep Singh with him) (Nurul & Charan) for the appellant.
Hamdan Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] The appellant was convicted and sentenced to suffer the death penalty upon the following charge:

> Bahawa kamu pada 6.7.2011, jam lebih kurang 9.45 malam, bertempat di sebelah kiri jalan, hadapan Tiang Elektrik No VT SPWA 17 & TS B 20, Jalan Terusan, Simpang Lima di dalam Daerah Kerian, di dalam Negeri Perak Darul Ridzuan, telah mengedar dadah berbahaya iaitu cannabis seberat 1793 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The appeal before us was in respect of the said conviction and sentence.

[3] We found no merit in the appeal and dismissed the appeal without more. We now give our grounds.

THE CASE FOR THE PROSECUTION

[4] On 19 June 2011, PW5 (Detective Sub Insp Busra bin Abd Kadir) had received information from his informer of a certain individual going by the name of 'Man' being involved in drug trafficking activities in Titi Serong, Kerian, Perak.

[5] PW5 passed on the information to his superior officer, PW4 (ASP Mohd Fikri bin Hashim) who then instructed PW5 to act as an agent provocateur ('AP') to negotiate for the purchase of drugs from 'Man'.

[6] On 22 June 2011, PW5 received a telephone call from his informer indicating that 'Man' had agreed to see him that night at Titi Serong.

[7] On 22 June 2011 PW5 went to Titi Serong in his informer's motorcar to meet 'Man', followed by two other police officers in an unmarked police car.

[8] At about 9.50pm, PW5 met 'Man' at Titi Serong bus stop, the agreed location for the *rendezvous*. He was introduced to 'Man' by his informer. 'Man' came on a Honda EX5 motorcycle bearing the registration No ABM 3667. In court, PW5 identified the appellant as 'Man'.

[9] PW5 proceeded to negotiate for the purchase of drugs with the appellant. The appellant agreed to supply the drugs but made no promise when it could be supplied and the amount to be supplied as he himself had run out of stock of the stuff.

[10] PW5 was further informed by the appellant that he would call PW5 once the drugs were available. The appellant asked for PW5's telephone number. PW5 gave his telephone number as 019-4221106 whereupon the appellant promptly made a 'miss-call' with his telephone, indicating his number as 017-5121894.

[11] It was PW5's testimony that his informer was not involved in the negotiation.

[12] On 5 July 2011, PW5 received a telephone call from his informer that the appellant had called to inform him that he had 2kg of *ganja* (cannabis) with him and had requested PW5 to collect the drugs at Titi Serong.

[13] PW5 promptly communicated with the appellant confirming his purchase. He also made a request to take delivery of the drugs on 6 July 2011, in the evening. The agreed price was RM2,650 for 1kg of *ganja*.

[14] PW4 was notified of the arrangement. On 6 July 2011, PW4 briefed his team consisting of about ten officers. They left Jabatan Siasatan Jenayah Narkotik, IPK, Ipoh, Perak for Kerian at about 6.15pm.

[15] At about 7pm, PW5 called the appellant to confirm that he was on his way to Kerian. The appellant told him to come to Titi Serong to take delivery of the drugs.

[16] At about 8pm, PW4 ordered his men to meet at the compound of Masjid Pulau Bogak, Kerian. PC Mohd. Fadli was instructed to be the second AP to assist PW5 in the operation. He is to act as PW5's henchman. In addition, PW5 was given RM6,000 by PW4 as flash money. The agreed signage indicating delivery of the drugs was for either PW5 or PC Mohd Fadli to scream the word 'Polis!'. Both PW5 and PC Mohd Fadli were to use a Proton Wira motorcar No WLA 9480.

[17] At about 9pm while still at the compound of the *masjid*, PW5 called the appellant to inform him that he had arrived at Bagan Serai and would call him (the appellant) again upon his arrival at Titi Serong once he found a suitable location to effect the transaction.

[18] At about 9.40pm the team arrived within the neighbourhood of Simpang 5, Titi Serong. PW5 called the appellant indicating his location at Titi Serong.

[19] The appellant agreed to come to the location selected by PW5. When asked, PW5 told the appellant that he came with his assistant. The team members next proceeded to take their respective positions within the vicinity.

[20] The appellant arrived at PW5's location on a Honda EX5 motorcycle bearing the registration No ABM 3667 about five minutes later. PW5 was at the rear, outside his motorcar WLA 9480 while PC Mohd Fadli was seated at the front passenger seat. The appellant stopped his motorcycle at the rear left side of the motorcar as directed by PW5.

[21] PW5 proceeded to ask for the 'barang' (drugs). The appellant showed a black plastic bag in the 'raga' of the appellant's motorcycle. The appellant was still sitting astride on his motorcycle. PW5 opened the said black plastic bag. He saw '2 ketulan mampat' wrapped in translucent plastic wrappings.

[22] After ensuring that the '2 ketulan mampat' were *ganja*, he called out PC Mohd Fadli for the money. He introduced PC Mohd Fadli to the appellant as Panjang. PC Mohd Fadli told PW5 that the money was inside the car. PW5 told PC Mohd. Fadli that the 'barang' was in the 'raga' of the motorcycle.

[23] When PW5 was at the rear side of his motorcar pretending to take the money, he heard PC Mohd Fadli screaming 'Polis!' Next he saw PC Mohd Fadli grabbing the appellant's neck. PC Mohd Fadli was promptly assisted by other members of the raiding team to subdue the appellant.

[24] PW4 took custody of the appellant and the incriminating exhibits.

[25] The appellant was next taken to his house by PW4 and members of his team. The appellant's house was not far from the scene of his arrest and seizure of the incriminating exhibits. Small quantities of drugs were recovered from the appellant's house.

[26] The appellant and the exhibits were finally taken to IPD Kerian and were handed over to the investigating officer, PW6 (ASP Frediel ak Nyambung). Earlier, PW4 had lodged a police report (exh P16) pertaining to the arrest of the appellant and the seizure of the drugs evinced at p 234, *Jld* 3, *rekod rayuan* ('RR').

[27] The chemist, PW3 (Puan Nurul Fadlina bt Harun) had analysed the '2

ketulan mampat' and found it to be cannabis within the meaning of s 2 of the Dangerous Drugs Act 1952 ('the DDA 1952') weighing 1,793g. Her report is exh P15, evinced at p 233, *Jld* 3, *RR*.

[28] At the end of the prosecution's case, the learned trial judge found that the prosecution had proven that the '2 ketulan mampat' were cannabis within the definition of s 2 of the DDA 1952 and there was no break in the chain of the movements, custody and handling of the said cannabis. The cannabis analysed by PW3 and produced in court through PW3 were the same cannabis seized by PW4 from the 'raga' of the appellant's motorcycle at the scene of the crime.

[29] The learned trial judge found PW5 to be a credible witness. He also found the sale and purchase transaction of the said drugs between PW5 and the appellant had been proven. There was no evidence that PW5's informer had enticed the appellant to commit the offence as the negotiation for the said transaction was solely held between PW5 and the appellant. The conduct of the said informer did not metamorphose into that of an AP and, he thereby retained the protection conferred upon him under s 40A of the DDA 1952. The appellant indeed had possession of the said drugs and he had committed an act of trafficking (act of selling) within the ambit of s 2 of the DDA 1952.

[30] Having satisfied that the prosecution had established a prima facie case, the learned trial judge ordered the appellant to enter his defence.

THE DEFENCE OF THE APPELLANT

[31] The appellant gave evidence on oath.

[32] In brevity, the appellant testified that PW5, who had wanted to enquire about the supply of drugs, was brought to him by one Muzammil.

[33] The appellant queried Muzammil why he did not himself supply the drugs to PW5 as he was also a drug trafficker.

[34] The said Muzammil then had a discussion with PW5 whereby Muzammil then asked to be given a little bit of time. Before they left, the appellant had exchanged telephone numbers with PW5.

[35] On 5 July 2011, Muzammil informed the appellant that he had some drugs with him. When PW5 telephoned the appellant on the same evening, the appellant informed PW5 that Muzammil had obtained some drugs for him and that PW5 was to deal directly with Muzammil.

A **[36]** Muzammil came to the appellant's house the following day bringing with him a plastic bag containing cannabis. The appellant's elder brother and his friend, Azmi, were at his house at the material time. Muzammil then informed the appellant that his telephone had run out of power. Minutes later the appellant received a telephone call from PW5. The appellant handed over
B his telephone to Muzammil for Muzammil to respond.

[37] Muzammil subsequently requested the appellant to send the said cannabis to PW5. The appellant agreed with no hesitation.

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[38] Meanwhile, the appellant's friend, SD2 (Nor Azmi bin Zakaria), testified that sometime in November, Muzammil had come to the appellant's house bringing with him two black plastic packets.

D **[39]** SD4 (Insp Mohd Faiz bin Said) testified that PW5 had lied in another case vide Kantan Report 593/12, where PW5 had stated that the suspect therein was arrested soon after he got down from the car and was at the five foot way of the hotel, whereas the suspect said that he was arrested at the corridor of the hotel. A scrutiny of the hotel's CCTV revealed that the suspect was telling
E the truth. This resulted in the case being closed with no further action by the public prosecutor.

[40] At the end of the defence case, the learned trial judge found that the role played by Muzammil in the defence of the appellant was raised for the first time
F only during the defence stage. The learned trial judge also found that the appellant's testimony that Muzammil had come to his house bringing a plastic bag containing drugs and requesting the appellant to give it to PW5 was an afterthought. The learned trial judge also opined that the fact that PW5 had lied in another unconnected case is not sufficient to seriously injure his
G credibility. PW5 was not discredited though he was challenged. The learned trial judge finally found that the defence of the appellant had failed to cast a reasonable doubt upon the prosecution's case and thereby found the appellant guilty and convicted him of the offence as proffered.

H THE GROUNDS OF APPEAL

[41] The appellant posited four grounds of appeal:

(i) the learned trial judge erred when he found the prosecution had proven
I the weight of the cannabis;

(ii) the learned trial judge erred and had misdirected himself upon his failure to properly evaluate the entire material witnesses for the prosecution and the defence pursuant to s 182A of the Criminal Procedure Code ('the CPC');

(iii) the learned trial judge erred when he extended the protection under s 40(1) of the DDA 1952, to the informer and s 114(g) of the Evidence Act 1950, ought to be invoked against the prosecution; and

(iv) the learned trial judge erred and had misdirected himself upon his failure to find that PW5's evidence has been challenged and rebutted by the witnesses for the defence.

OUR DECISION

Ground (i) — weight of cannabis

[42] Learned counsel submitted that the prosecution did not elicit any evidence from the chemist, PW3, that the weighing machines had been properly calibrated before it was used by her to weigh the said drugs. Hence, the accuracy of the weighing machine is a real issue, giving rise to the consequential issue of the actual weight of the cannabis involved in the commission of the offence.

[43] It is pertinent however, to note that the defence did not make any submission of no case to answer at the end of the prosecution's case. It follows that it is implicit that the defence had conceded that a prima facie case had been established against the appellant upon the charge proffered against him. The prima facie findings must necessarily include the weight of the impugned drugs and this must, as a matter of common sense involved the finding that the weighing machines used by PW3 were accurate and had been accordingly calibrated on schedule. The appellant did not adduce new evidence in his defence to warrant a revisit of the prima facie finding of the weight of the cannabis.

[44] It is also apparent that the defence had failed to put up a challenge that the weighing machines has not been calibrated and hence, inaccurate before its use by PW3. Neither was PW3 challenged that the weighing machines had not been calibrated on schedule and thus not accurate. PW3 was also not challenged that the weighing of the impugned drugs carried out by her were flawed on account of the same. Neither she was challenged that the weight of the impugned drugs obtained by her were not accurate. PW3 was not challenged on any issue at all. In fact, she was not even cross-examined by learned counsel. Hence, her evidence ought to be accepted as true — see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.

[45] There is therefore no apparent basis for the appellant to complain at this stage that the weighing machines were not calibrated and were inaccurate and hence, the weight of the said cannabis were not proven. In raising the issue only at this late stage, the appellant had in fact denied PW3 the opportunity to

refute the allegation or to offer some explanation pertaining to the condition of the weighing machines at the material time, or most importantly, to offer proof that the weighing machines had been calibrated on schedule and were indeed accurate. It is incumbent upon the appellant to put his essential and material case in the cross-examination of the appropriate prosecution witnesses, failing which it follows that the testimony of the prosecution witnesses are to be accepted.

Ground (ii) — failure by the learned trial judge to evaluate all the evidence upon the conclusion of the trial pursuant to s 182A of the CPC

[46] Learned counsel submitted that the learned trial judge's findings that the evidence relating to Muzammil's role was raised for the first time only during the defence stage and was never suggested to the witnesses for the prosecution during the prosecution's case was contrary to the evidence adduced. The learned trial judge had equally misdirected himself when he found that the appellant's testimony that Muzammil had came to his house bringing a plastic bag containing drugs and requesting the appellant to give the same to PW5 was an afterthought.

[47] It was further submitted that PW5's informer was in fact Muzammil and his role in the events leading to the arrest of the appellant was put in full during the cross-examination of the prosecution witnesses, and through the evidence of the appellant and the evidence of his brother's friend, SD2 (Nor Azmi bin Zakaria). In addition, the prosecution did not at any time suggest that the said Muzammil was not PW5's informer. The learned trial judge also did not evaluate the testimony of SD2 when he said that he saw Muzammil coming to the appellant's house carrying a plastic bag containing *ganja*. From the grounds of judgment, it is apparent that the learned trial judge upon conclusion of the trial, did not at all evaluate the cross-examination of PW4, PW5 and PW6 with the evidence of the witnesses appearing for the defence.

[48] We have tooth-combed the evidence of PW4, PW5 and PW6 (the investigation officer) and found that Muzammil's name and the role played by him was never raised to these witnesses. Hence the learned trial judge was correct when he found that Muzammil's role was raised for the first time only at the defence stage.

[49] We found that it was also never suggested to these witnesses that Muzammil was the informer and that the said Muzammil was the informer working and providing all the information to PW5. Again, the learned trial judge was correct when he found the same.

[50] We also found nothing in the records to show that it has been suggested to PW4, PW5 and PW6 that it was Muzammil who brought the '2 ketulan mampat' in a plastic bag to the appellant's house and that Muzammil had requested the appellant to hand over the same to PW5. Hence the learned trial judge was also correct in finding as such.

[51] We also found that what had allegedly transpired between the appellant and the said Muzammil in the narrative of the appellant's defence emerged only at the defence stage during the testimony of the appellant and SD2. The entirety of the appellant's evidence in connection with the role played by Muzammil was never suggested to any of the prosecution witnesses during the prosecution's case. Equally, it was never raised during the police investigation. These were also the findings of the learned trial judge. He was entirely correct.

[52] The need for the appellant/defence to put his essential and material case in the cross-examination of the prosecution witnesses is not a mere technical rule of evidence. It is a rule of essential justice — see *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; [1968] 1 LNS 24. Meanwhile, in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215, the court stated:

> It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses.
>
> It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examination that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.

[53] In *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 15, the Court of Appeal stated, inter alia:

> [63] Although in our criminal jurisprudence there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought or a recent invention as happened in this case.

[54] On the facts and evidence, we were entirely with the learned trial judge's findings that Muzammil's role was raised for the first time only during the defence stage. Equally, we were with him when he found that the appellant's defence that Muzammil had come to his house bringing a plastic bag

containing drugs and requesting the appellant to hand it over to PW5 was an afterthought, thus detracting from the weight to be accorded to the defence.

[55] Muzammil appeared to be the key figure in the appellant's defence. The appellant claimed to have known him much earlier and also knew him as a drug trafficker. In such event the appellant should not have encountered any difficulty to name the informer at the earliest possible opportunity and not wait until his turn to enter the witness box to reveal that the informer in question was none other but Muzzamil. There is nothing to prevent the appellant from identifying and naming Muzammil as the said informer during the cross-examination of the prosecution witnesses, in particular PW4, PW5 and PW6.

[56] We were equally perplexed when the appellant said that he had agreed with Muzammil's request to bring the said drugs and give it to PW5. The appellant is not a half-witted pea brain country bumpkin. It thus begs the question why would he want to do it for no apparent reason with full knowledge of the highest of risk of his life and liberty. All the more so when PW5 had come to see him about the supply of drugs with Muzammil and he knew that Muzammil himself was a drug trafficker. He could have decline the request without more and told off Muzammil to deliver it himself to PW5.

[57] We were further perplexed with the submission of learned counsel that the appellant conceded delivering the drugs to PW5 but the amount of drugs delivered were only slightly more than 100g, whereas the evidence elicited from PW4 and PW5 showed that '2 ketulan mampat' were delivered by the appellant and PW3 confirmed that the '2 ketulan mampat' were cannabis weighing 1,793g. Verily, there is no reason why the evidence of PW4, PW5 and PW3 should not prevail over the evidence of the appellant.

Ground (iii) — error by the learned trial judge when he extended the protection under s 40(1) of the DDA 1952, to the informer and invocation of s 114(g) of the Evidence Act 1950, against the prosecution

[58] Learned counsel submitted that the informer should not be accorded the protection under s 40(1) of the DDA on account, inter alia, that the informer was known to the appellant as Muzammil and had played an active role in the transaction by bringing the said drugs to the appellant's house and requesting the appellant to deliver it to PW5; informing PW5 that the appellant had called him to say that he had the supply of drugs with him and requesting PW5 to take the delivery of the drugs from him (the appellant); the informer was also involved in drug trafficking activities and PW5 had tried to shield the informer's role in the said activities; the informer was not a registered

informer; and, the informer was present and had introduced the appellant to PW5. A

[59] We have scrutinised the evidence presented before us by both sides of the divide and found nothing to suggest that the informer's name was Muzammil. The defence had failed to put the same to PW4, PW5 and PW6 during their cross-examination. It is clearly an afterthought to raise it only at the defence stage. Upon the evidence, we also found that the informer's role was only confined to the supplying of information of drug trafficking activities to PW5; introducing the appellant to PW5; informing PW5 through the telephone that the appellant had informed him (the informer) that he had the drugs with him and to inform PW5 to collect the drugs from the appellant; and, there is no evidence to suggest that the informer had taken part in the negotiation to transact the said drugs and did not take part in the actual sale and purchase transaction of the said drugs. B C D

[60] There is equally no evidence to show that the informer had caused or had enticed the appellant to sell the said drugs to PW5 in the course of the negotiation between PW5 and the appellant over the sale and purchase of the said drugs. E

[61] There is also no evidence suggesting that it was the informer who had requested the appellant to bring the said drugs to the point of delivery. The appellant's evidence that the said informer (Muzammil) had come to his house with the said drugs and instructing the appellant to deliver it to PW5 is unbelievably incredible. We have commented on this issue elsewhere. On the other hand, the evidence showed that the three telephone calls made by PW5 to the appellant on the 6 July 2011 relating to the arrangement of the drug transaction as confirmed by the documentary evidence exh P24B, evinced at p 248, *Jld* 3, *RR*, clearly showed that the only parties involved in the transaction were the appellant and PW5. F G

[62] The evidence also showed that the transaction had taken place at a location agreed upon between PW5 and the appellant without the involvement of the informer through the series of telephone conversations between PW5 and the appellant on 6 July 2011, confirmed by exh P24B. H

[63] In essence, the evidence does not suggest that the informer had metamorphosed into an agent provocateur and hence cannot hide behind the cloak of secrecy under s 40(1) of the DDA for protection. The learned trial judge was verily correct in coming to such a conclusion and therefore there is no basis to invoke s 114(g) of the Evidence Act 1950, to operate adversely against the prosecution on account of the prosecution's failure to call the said informer to testify. Thus, in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; I

[1987] CLJ Rep 221, the Supreme Court stated at p 494 (MLJ); p 224 (CLJ):

> In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case. In the instant case, the protection under s 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14 and introduced him to the appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under s 114(g).

[64] On the facts, we opined that the informer's role in the case before us did not differ much from what the informer did in *Munusamy*'s case. Therefore, he is entitled to remain anonymous and to the full protection accorded to him under the law — see also *Prabakaran a/l Peraisamy v Public Prosecutor* [2013] 1 MLJ 304; [2012] 8 CLJ 133; *Shahrizal bin Abdul Ghani v Public Prosecutor* [2014] 1 MLJ 769; [2014] 1 CLJ 70; *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233; *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17.

Ground (iv) — the learned trial judge erred and misdirected himself upon his failure to find that PW5's evidence has been challenged and rebutted by the witnesses for the defence

[65] We have considered at length the body of evidence constituting the core of the appellant's defence in the preceding paragraphs and found, as the learned trial judge did find, that the same, in particular that the informer was Muzammil and in fact it was Muzammil who brought the said drugs to the appellant's house and asked the appellant to deliver it to PW5, were raised for the first time at the defence stage and therefore could not be accorded the due weight it deserved to the defence. Hence, it did not bring home the issue that PW5's evidence has been challenged and rebutted.

[66] The defence, in their attempt to show that PW5 is not a reliable witness also drew our attention to the decision in *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, where PW5 was also featured as the AP. Learned counsel submitted that PW5's testimony therein was rejected by the Court of Appeal. This issue was also canvassed before the learned trial judge and His Lordship found, at p 26, *Jld* 1, *RR*:

> 34. Pihak pembelaan merujuk kepada kes *Mohd Johi Said v PP* [2005] 1 CLJ 339 dalam mencabar kredibiliti SP5. Mahkamah telah meneliti alasan penghakiman Mahkamah Rayuan dalam kes tersebut dan mendapati langsung tidak dinyatakan bahawa keterangan SP5 ditolak. Hakim Gopal Sri Ram hanya mengkritik tatacara pengendalian hakim bicara berkenaan kegagalannya untuk memberi amaran atas dirinya dan mempertimbangkan isu kredibiliti SP5 (SP3 dalam kes itu) setelah pihak pembelaan mencabarnya di dalam pemeriksaan balas.

[67] We were with him in respect of his analysis of the decision in *Mohd Johi Said*'s case in so far as the credibility of PW5 (SP3 therein) is concerned. PW5 was never discredited in the case therein. It was the conduct of the learned trial judge in dealing with the evidence of PW5 (SP3 therein) after being made aware that he had before him a witness whose evidence may be tainted, that came under the radar of the Court of Appeal and verily the learned trial judge was faulted — see pp 451–417 (MLJ); pp 395–396 (CLJ) of the said authority.

[68] Learned counsel also referred to us PW5's role in *Kamalahassan a/l Latchimanan v Pendakwa Raya* [2008] 3 MLJ 810; [2008] 4 AMR 481 and the testimonies of SD3 and SD4 concerning the allegedly less than desirable conduct of PW5 to wit, the lies made by him, in the arrest of SD3's relative and another unrelated case investigated by SD4, a police officer, vide Kantan Report 593/12. Learned counsel submitted that the defence had utilised s 146(c) of the Evidence Act 1950, to shake the credit worthiness of PW5 by injuring his character through these two witnesses, and the learned trial judge appeared to have agreed that PW5 had lied. This, according to learned counsel is sufficient to shake PW5's credibility. However, we noted that no impeachment proceeding was instituted against PW5 pursuant to the said section of the Evidence Act 1950.

[69] However, it is not the law that if a witness demonstrably tell lies on one or two points, it must necessarily follow that he will not be a truthful witness and that his whole evidence must in law be rejected. At the highest, his reliability has been brought to the fore and as a matter of prudence it warrants that the rest of his evidence must be scrutinised with great care and suspicion. The court in *Dato' Seri Anwar Ibrahim v PP* [2014] MLJU 1876; [2014] 5 CLJ 679 reiterated the rule that:

> Even if SP25 was found to be not telling the truth in the Suhakam Inquiry, it does not follow that likewise, he will not be a truthful witness in the trial. It is trite that if a witness demonstrably tell lies on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. However, to say that because a witness has been proven to be a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong (see *Khoon Chye Hin v PP* [1961] 1 MLJ 105). It must be noted that the Suhakam Inquiry and trial are two separate and unrelated proceedings. There is no nexus what so ever between the two proceedings.

[70] It is of course the business of the learned trial judge to assess whether the said witness (PW5), in the light of the lies on one or two points, is a credible witness or otherwise. He will need to approach the evidence of the said witness with caution and warn himself of the danger of acting on his evidence — see *Mohd Johi Said & Anor v PP* at p 395 paras (f)–(g). The learned trial judge

found PW5 to be a credible witness despite the testimonies of DW3 and DW4 that PW5 had lied elsewhere in an unrelated case — see para 42, at p 33 *Jld* 1, *RR*, of his grounds of judgment. It was, nevertheless, open to him and is within his sole province, for good reasons, to have found PW5 a credible witness. We are in the most disadvantageous position to disagree with him.

[71] Learned counsel also brought to our attention several inconsistencies in the evidence of PW4 and PW5. For instance, PW4 testified that he received a telephone call from PW5 on the morning of 5 July 2011 regarding the supply of the said drugs by the appellant, whereas PW5 said that he only received the said information from his informer at about 2pm on the said instant. PW4 also said that the said informer was not a registered informer whereas PW5 said that the informer was a registered one. However, in our view, these are minor discrepancies. It has no effect upon the core issue that PW5 had negotiated to buy drugs from the appellant and that the appellant had indeed supplied the said drugs to PW5 pursuant to the said negotiation and upon the terms of the said negotiation.

[72] It was also pointed to us that the telephone calls made by PW5 to the informer and the appellant and vice versa relating to the said negotiation for the sale of the drugs prior to 6 July 2011 were not supported by any documentary evidence. Hence it brings the reliability of PW5's evidence into question. Be that as it may, the evidence showed that the three telephone calls made by PW5 on 6 July 2011 relating to the confirmation of the said drugs purchase and the arrangement as to where the said drugs were to be transacted were fully recorded in exh P24B, evinced at p 248, *Jld* 3, *RR*. It lent credence to PW5's testimony that there was an agreement between PW5 and the appellant to transact the said drugs. The seizure of the '2 ketulan mampat' had fortified the testimony of PW5.

[73] Having considered both the evidence of the prosecution and the defence, the learned trial judge said at paras 41–42, at p 32, *Jld* 1, *RR*:

> Mahkamah telah sekali lagi memeriksa keterangan SP5 dan dibandingkan dengan keterangan pembelaan OKT, SD3 dan SD4. Mahkamah membuat suatu dapatan fakta bahawa kredibiliti SP5 kekal kukuh dan utuh walaupun dicabar. Malah keterangan SP5 sebagai penyamar sulit disokong oleh OKT berkenaan pertemuannya dengan Khairul yakni SP5 dan OKT sendiri mengakui bahawa beliau adalah pengedar dadah dan apabila SP5 bertanyakan bekalan kepada OKT, OKT menjawab tiada bekalan. Keterangan SP5 turut disokong oleh keterangan SP4 walaupun undang-undang tidak berkehendakkan keterangan seseorang AP disokong.
>
> ...
>
> Seterusnya Mahkamah Persekutuan dalam kes *Wan Mohd Azman Hassan v PP* (2010) 4 CLJ 529 memutuskan bahawa:

(7) Admissibility of the evidence of an agent provocateur is not in issue. Neither is his credibility as a witness. Statute had provided for this in the form of s 40A of the Act which states ...

[74] We were decidedly on all fours with the aforesaid factual findings of the learned trial judge. There is nothing in the testimony of PW5 that is not inherently improbable. Neither were there material contradictions. In such event, there is no reason not to accept his testimony.

CONCLUSION

[75] For all the reasons given, we dismissed the appellant's appeal and affirmed the conviction and sentence handed down by the High Court.

Appeal dismissed, conviction and sentence affirmed.

Reported by Ashok Kumar